

**Policies, Procedures and the Police: An Assessment of Wrongful Conviction Risk in Nebraska**

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*Abstract:*

In the wake of over 200 individuals being exonerated through DNA evidence, social science researchers are beginning to examine critical errors in the Criminal Justice system process. Many of those errors reside in the “watchdogs” of our system: Police. The top three causes of wrongful convictions are mistaken eyewitness identification, lab errors and false confessions – all of which increase in risk when appropriate procedures do not exist or are not followed by law enforcement. This research aims to engage in a statewide survey of police agencies to determine both their existence of and adherence to policies regarding suspect identification procedures, evidence procedures and interrogation procedures.

### **Statement of the Problem:**

In 2000, the U.S. Council of Catholic Bishops noted in their document “Responsibility, Rehabilitation, and Restoration: A Catholic Perspective on Crime and Criminal Justice” that “[A] Catholic approach [to criminal justice] begins with the recognition that the dignity of the human person applies to both victim and offender”. (USCCB, 2000). This recognition of dignity in many ways has served as the backdrop of our justice system. In the United States, our criminal justice system is structured to operate under a presumption of innocence until a fair trial shows otherwise. In reality, research indicates that this “presumption of innocence” is often not made, particularly for individuals who are young, minorities, poor and/or have low measured intelligence, making these the most vulnerable populations for wrongful conviction (Holmes, 2008; Parker, Dewees and Radelet, 2008). As such, these suspected offenders actually become victims of systemic and personal error and bias. This affront to dignity not only challenges the individuals who worth within the system, but the system itself, and the only way to restore to wholeness to our system and its place within our society is to confront its failings through a lens of academic rigor and integrity. Although the Bishop’s document pre-dates the alarming trend in uncovering wrongful convictions, their policy recommendations speak clearly: that, among many other changes, the criminal justice system has a responsibility to “advocate policies that help reduce violence, *protect the innocent*, involve the victims, and offer real alternatives to crime (emphasis added). As the innocent who find themselves in the wheels of the criminal justice system are among the most vulnerable members of our society, researching the correlates and causes of wrongful conviction fits well with Creighton’s mission of be “women and men for and with others”.

### **Significance of the Problem:**

As of October 2010, two hundred sixty individuals nationwide have been exonerated through DNA evidence ([www.innocenceproject.org](http://www.innocenceproject.org), 2010). While this number is inexcusably high, it undoubtedly only touches on a much larger issue of wrongful conviction in the United States. No one knows the exact number of wrongfully convicted individuals currently serving time in the criminal justice system, but there are many estimates regarding rates of wrongful convictions, which, considering the high incarceration rate in the U.S., translates into thousands, rather than hundreds, of potential convictions of innocent people: “An overall wrongful conviction estimate of ½ percent [the most conservative rate agreed on by most experts] extrapolates to about 5,000 wrongful felony convictions and the imprisonment of more than 2,000 innocent persons in the United States *every year*.” (Zalman, Smith and Kiger, 2008, p. 72, emphasis added). The idea that, even with a fairly conservative estimate on the rate of wrongful conviction (some have put the rate as high as 10%) the number of convicted innocents is no less than staggering. Perhaps most disturbing is the idea that systemic errors can result and have resulted in innocent individuals being executed. Attorneys and academics have suggested this possibility even before DNA was used as a tool to free the innocent (Bedau and Radelet, 1987).

Of the wrongful convictions that have resulted in exonerations, the New York Innocence Project (which founded the nationwide Innocence Network) reports that nearly 75% of these are caused by mistaken eyewitness identification, over half by invalidated or improper forensic science and nearly 25% through false confessions ([www.innocenceproject.org](http://www.innocenceproject.org), 2010). To make matters even more complex, many of these cases have multiple causes of wrongful conviction, and each of these causes can have an additive effect on the risk of wrongful conviction (Hassel and Kassin, 2009). For instance, the likelihood that a witness might misidentify a suspect

dramatically increases if that witness also knows that there is forensic evidence “linking” the suspect to the crime (even if that evidence is false). Although incompetency and bias has certainly been found in the courtroom, the overwhelming majority of wrongful convictions begins with the conduct of police officers who make arrests, set lineup procedures and interrogate suspects.

Viewing police role in wrongful conviction is complicated on a number of levels. First, law enforcement agencies tend to be less than transparent about their policies and procedures, which means that much of what happens between police and suspects is unknown to the general public. Second, because police policies are often carried out in an informal manner, even when they themselves are formal, it is difficult to pinpoint the effects of ineffective policies versus ineffective or problematic procedures. Nevertheless, an assessment of the existence and use of police procedures, particularly regarding suspect identification, evidence procedures and interrogation is integral to an accurate look at how wrongful convictions occur.

Nebraska in particular has been plagued with a few high profile cases of wrongful conviction and imprisonment that indicate that police procedures may not be working well. In 2008, six individuals were exonerated for a rape and murder in Beatrice, NE (<http://www.ketv.com/news/18569643/detail.html>) Three of the six spent nearly 20 years in prison, and this was the largest number of individuals exonerated from one case in the United States. Both lab error and false confessions were behind these convictions. More recently, two individuals from Murdoch, NE were held for over a year (though never charged) in a double murder (<http://www.ketv.com/news/23124215/detail.html>). This case also involved a false confession, and has resulted in the conviction of the Douglas County lab supervisor, who planted evidence to substantiate police’s case ([http://journalstar.com/news/state-and-regional/nebraska/article\\_8cd5cb4c-368c-11df-8531-001cc4c03286.html](http://journalstar.com/news/state-and-regional/nebraska/article_8cd5cb4c-368c-11df-8531-001cc4c03286.html)). While both of these cases involved both evidence procedural issues and false confessions, there are doubtless others in the state which also involve problematic eyewitness procedures. In 2008, Sen. Lathrop introduced a bill which was signed into law mandating video recording of all police interrogations (see Nebraska statute 29-4501), in part due to the alarming Murdoch case of false confession which was highly publicized by the media. Currently, this law is the only state statute mandating police procedures, and there is little indication that officials have followed up with agencies to make sure this has been implemented fully.

### **Summary of Pertinent Literature:**

#### *Lineup Procedures.*

While pertinent literature all points to witness misidentification as the leading cause of wrongful conviction (Holmes, 2008; Zalman et al. 2008), and academics have known the devastating consequences of relying on eyewitness identification for quite some time (Bedau and Radelet, 1987), very little research has looked specifically at lineup procedures and their link to problematic identification. Indeed, most research on witness misidentification looks primarily at psychological nuances and memory mechanisms, which are often faulty when humans try to recall individuals (see Douglass and Stedlay, 2006 for an overview). However, several research articles indicate that the way in which lineups are conducted can also have a profound effect on witnesses “fingering” the wrong person (Wells, Luus and Windschitl, 1994; Mcallister, Michel, Tarcza, Fitzmorris, and Nguyen, 2008; Brewer and Palmer, 2010 ). Particular procedures such as “show ups”, which in essence is a one-person lineup, where police ask a witness if a particular person is the perpetrator, seem to be particularly susceptible to false positive identifications

(Cicchini and Easton, 2010). And while the legal community is well aware of the dangers posed by problematic eyewitness procedures and has even offered several suggestions on how to change eyewitness procedures (Koosed, 2009), to date, very little has been done to fully assess the issue or to change it within the criminal justice system (Thompson, 2009). This lack of success in altering lineup procedures through court enforcement could indicate that law enforcement do not see that current lineup procedures are problematic, or at least that the effort required to alter them would not result in substantial improvement in convicting (or convicting the correct people). No comprehensive study has used interviews with police themselves as a useful tool for studying lineup procedures, so the answers to why lineup policies have not been mandated and incorporated into procedure to prevent wrongful convictions is left unanswered. The current research aims to get at a law enforcement perspective on not only the existence of policies in this area, but why they believe these may or may not be warranted (or even followed closely).

#### *Evidence Handling.*

In 2009, the National Academy of Sciences released a scathing report of the nation's forensic sciences (NAS, 2009). One of the issues that this report highlighted was the lack of standards in many labs carrying out forensic testing. As most crime labs that utilize forensic testing are affiliated with (and often share physical space with) law enforcement agencies, identifying whether these agencies have and follow policies and procedures with regard to evidence handling is critical in assessing forensic standards. Most research about forensic work has focused on laboratory procedures rather than evidence handling, but some notable pieces look at procedures before, during and after laboratory tests, particularly in the stages of evidence gathering (Almog, 2006). This research also notes the lack of procedures with regard to handling of case evidence even before it reaches the lab, rendering accountability procedures for lab work itself moot. This knowledge indicates the importance of researching *police* with regard to evidence, and not just laboratory technicians. What's more, is not only are mistakes both inside and outside the lab with regard to evidence problematic in themselves (Loftus and Cole, 2004), but haphazard evidence handling also tends to correlate highly with other causes of wrongful conviction, namely witness misidentification (Wogalter, Malpass and McQuiston, 2004). Considering the lack of independence from police departments, and the reliance on lab reports as "scientific fact" by prosecutors, this area of crime solving has also become a hugely problematic cause of wrongful convictions.

#### *Interrogation Procedures.*

Perhaps the most perplexing reason for wrongful convictions is that of a false confession, yet a large number of wrongly convicted do just this (Leo, 2008). There is a good deal of information, again, particularly about the psychology of false confession (see Leo and Davis, 2010 for an overview) indicating that those most vulnerable to confessing, even to something they did not do, are those who are poor, a member of a minority class, and most especially, those with learning disabilities or who are of below average intelligence (Leo, 2008). Not surprisingly, interrogation procedures have a great deal to do with the likelihood of false confessions, and this has been particularly so in the United States, where governments are slow to mandate recording interrogations to determine ineffective or abusive practices (Dixon, 2010). One of the most disturbing discoveries about this police procedure is how little is known about the effect of interrogation procedures on false confessions, and how rare these types of interrogation techniques make their way into the court room, to a jury (Leo and Liu, 2009).

One of the most interesting components to interrogation tactics is the use of the threat of capital punishment in interrogation procedures. While there is some evidence that this particular tactic is widespread in death penalty states (Huff, 2002) there is to date no studies in which police are directly asked about this use of interrogation tactics. However, there is ancillary evidence that this may be important. Of the known cases of wrongful convictions that included a false confession, an overwhelming majority (upwards of 80%) occurred in states that have the death penalty ([www.innocenceproject.org](http://www.innocenceproject.org)). While this figure is not conclusive by any means, it does suggest that further examination of this procedure is warranted.

For all procedures, the existence of standards and adherence to those standards have been found to be crucial for the professionalization of police departments (). I assert that they are also necessary to reduce risk of wrongful conviction, as they make police procedures more transparent and hold law enforcement officers formally accountable to a *process* of justice rather than simply the result of conviction.

### **Research Questions:**

Considering the large implications that police policies and procedures may have on wrongful convictions, and the complexity of assessing what this affect may be, this research will aim to first answer broader research questions regarding the existence of formal policies, and then will use this information to determine the specifics of how lineup, evidence handling and interrogation procedures are carried out. While these research questions will not definitively answer whether there is a link between procedures and wrongful convictions, they should uncover potential areas of weakness in police procedures in the most likely areas of wrongful conviction.

#### ***1. To what extent do law enforcement agencies in Nebraska have formal procedures regarding lineups, evidence handling and interrogations?***

This question seeks to identify whether written policies and/or procedures exist regarding these practices. As noted earlier, one state law mandates the recording of interrogation procedures, although no effort has been made to ensure either the knowledge of this legislation or the adherence to it. As such, this question will allow agencies to identify the existence of procedures themselves, including the one mandated by state law.

#### ***2. Are lineups, evidence handling and interrogations carried out in a manner that is standardized?***

This question is intended to determine not simply the existence of policies, but the reality of how these procedures are carried out. In getting beyond policies to both the formal (or informal) procedures, a better assessment can be made as to whether these procedures might be problematic, and therefore a risk for contributing to a wrongful conviction. This will include further questions about training in these procedures, and whether an attempt is made to make sure that officers are held accountable to standardization.

#### ***3. In what way are the procedures for lineups, evidence handling and interrogations carried out?***

This final research question will attempt to get into the most specific aspects regarding what is actually done during these procedures. Several specific questions about particular parts of procedures (including use of “showup” procedures for lineups, protocol for different types of forensic evidence and use of tactics such as threat of death penalty in interrogations). In this

way, the more specific aspects of procedures can be identified and assessed, even if no formal policy regarding these procedures exist.

## **Design and Methods:**

### *Design of Study.*

The overall purpose of this research is to glean a sense of how these police procedures are done by law enforcement agencies in Nebraska. In addition, though, this study plans to determine whether some agencies differ from other agencies in the way in which these procedures are carried out, and in what other ways these agencies differ. As such, this is an inductive approach, as there is little theory guiding the expectation of these procedures. The study will consist of mail surveys, followed up with phone interviews with law enforcement agencies across the state, as well as a sample of face-to-face interviews and/or site visits. It will be a mix of both quantitative and qualitative data collection, noting the relationship of general formal policies with other characteristics of agencies, such as number of officers, type of agency (municipal or county), size of agency, and percent of women and minority officers. In addition, specific qualitative data on procedures should result in an overall picture of how these procedures are carried out in different agencies in Nebraska, and how they might differ by agency characteristic.

### *Procedures.*

Contact information for law enforcement agencies will be obtained from the Nebraska Criminal Justice directory, and a spreadsheet for each agency will be made. There are a total of 93 county agencies, 134 municipal agencies and the Nebraska State patrol, for a total of 228 law enforcement agencies. After IRB approval is received, each of the agencies will be contacted by mail or email (if available) and asked to complete a survey regarding formal and informal policies for lineup procedures, evidence procedures and interrogation procedures. In addition, a sample of 10 agencies will be contacted and asked if a visit to the agency will be possible. After a 3 week time lapse, a follow up phone call to those agencies who did not respond will confirm that the letter/email was received and a determination of whether the agency plans to participate in the research will be made. For the agencies willing to participate, they will have the option of completing the survey through a telephone interview or returning the survey via mail, email or fax. For those agencies who refuse to participate, the primary investigator will determine if a Freedom of Information Act would be useful. If a FOCA request is made, only the information regarding the existence of formal procedures could be obtained, and no additional information could be gathered. Site visits will be completed based on the willingness and availability of the agencies, and will be used to supplement additional information regarding the agency (i.e., a visual assessment of evidence rooms, and observation of lineup tools, interrogation rooms, etc.).

### *Data Analysis.*

Once survey data is collected, the data will be analyzed both through quantitative and qualitative techniques. A spreadsheet with specific information for each agency will allow a quantitative assessment of how agencies with particular characteristics differ in the presence or absence of formal policies regarding lineup, evidence handling and interrogation. This will be determined first through a simple correlation, and depending on the findings, may be followed up with more advanced statistics such as t-tests or even a logistic regression model, with the presence of formal procedures (measured by 1=yes / 0=no) as the dependent variable.

The bulk of the data analysis, however, will be assessing the qualitative data obtained through open-ended questions regarding how procedures are carried out. This will include identifying concrete procedures named in the survey (such as the “double-blind” procedure for police lineups) as well as looking for subtle distinctions in the survey that might indicate aims of the procedures without attention to the procedures themselves (such as “we just get the job done by any means necessary”). It is in these answers that I believe a truer assessment of the reality of these procedures can be made. These will then be combined with the quantitative analysis into a larger report, and an assessment of the need for further study can be made.

#### *Schedule for Completing the Project.*

##### Proposed Project:

The following timeline will be utilized to undertake the current study. .

##### ***Prior – Obtain IRB approval for surreys/interviews***

***May 9 – May 23<sup>rd</sup>, 2011 (Appx.2 weeks):*** Input data for law enforcement agencies and develop survey.

***May 23<sup>rd</sup> – June 6<sup>th</sup>, 2011 (Appx. 2weeks):*** Send out surveys to various agencies and line up site visits

***July 4-July 25<sup>th</sup> (Appx. 3 weeks):*** Complete site visits and follow up with agencies via phone

***July 25<sup>th</sup> – Aug 1<sup>st</sup> – (Appx. 1 week)*** Complete quantitative analysis

***July 29<sup>th</sup> – August 12<sup>th</sup> (Appx. 3 weeks):*** Complete qualitative analysis

Write up results in manuscript for submission

##### Manuscript Submission:

This research would provide a type of analysis that is currently not only absent from current criminal justice literature, but there is a great deal of interest in it and call for more research on it. In the past several meetings for the Academy of Criminal Justice Sciences and the American Society of Criminal Justice, panels and round tables have been devoted to the social scientific study of wrongful convictions. The time is ripe for this type of research to make top tier journals.

***Aug 12<sup>th</sup> – Sept 30<sup>th</sup> (Appx. 7 weeks):*** I believe that this would be a sufficient amount of time to pull the results of this research into a manuscript for either for *Justice Quarterly* or the *Journal of Crime and Justice*, both of which have taken on the topic of wrongful conviction in previous editions.

#### Future Avenues of Support:

The National Institute of Justice released a request for proposal in 2009 asking for submission from social scientists to study the problem of wrongful conviction. Because of the short turnaround time and my lack of initial research, I was not able to confidently apply for this funding, which consisted of only one award. However, this indicates that the problem of wrongful conviction has moved beyond the legal world and into that of social science, particularly criminal justice, and I fully expect that more grant opportunities such as this one will become available. In addition, there may be some local government interest in the policies and procedures of law enforcement agencies, and willing to support such research.

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